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No.: 88-1839

IN THE

Supreme Court of the United States

October Term, 1988

MARTIN ROMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Table of Contents

Introduction 1

Reasons for Granting the Writ 2

Point I The Decision of the Second Circuit, Retroactively Applying Speedy Trial Exclusions to Counts of a Superseding Indictment Which Were Not in Existence at the Time the Exclusions Were Made, Conflicts in Fact and Principle With Other Decisions of That Court, With Decisions of Other Circuits, and With Decisions of Various State Courts 2

Point II The Decision of the Second Circuit Presents an Issue of Great Importance to the Administration of the Federal Criminal Law That Is Likely to Re-Occur and That Has Not Been Addressed by This Court 2

Point III The Second Circuit's Decision on the Elements of a Continuing Criminal Enterprise Charge Is in Conflict With Decisions of This Court and Other Circuits; In Addition, the Decision of the Second Circuit Presents Issues of Great Importance to the Administration of the Federal Criminal Law 4

A. The Verdict as to Acting in Concert and Supervision 4

Point IV The Decision of the Court of Appeals Upholding and Instructions to the Jury Is in Conflict With Decisions of This Court and Other Courts of Appeals 5

A. Refusal to Charge on Equal Inferences . . . 5

B. *Allen* Charge 5

Conclusion 6

Table of Authorities

Keenan v. California, 109 S.Ct. 1656 (1989) 5

People v. Cruz, 111 AD 2d 725 3

People v. Augustine Rodriguez, N.Y.L.J. 5/25/89, p.22 col. 1 (1st Dept.) 3

State v. Howard, 45 Cr.L.Rptr. 2093 (1989) 5

United States v. Attanasio, 870 F. 2d 809 (2d Cir. 1989) 5

United States v. Beros, 833 F. 2d 455 (3d Cir. 1987) 4

United States v. Busacca, 863 F. 2d 433 (6th Cir. 1988), cert. denied, 45 Cr.L.Rptr. 4003 (1989) 4

United States v. Duncan, 850 F. 2d 1104 (6th Cir. 1988) 4

United States v. Gipson, 553 F. 2d 453 (5th Cir. 1977) 4

United States v. Karsseboom, 871 F. 2d 877 (9th Cir. 1989) 2

United States v. Roman, 870 F. 2d 65 (2d Cir. 1989) 1

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Introduction

Pursuant to Rule 22.6 of the Rules of the Supreme Court, petitioner files this Supplemental Brief to call the attention of this court to "new cases ... not available at the time of the party's last filing."

Initially, petitioner would note that the decision of the Court of Appeals on the judgment appeal is now officially reported at 870 F. 2d 65 (2d Cir. 1989).

REASONS FOR GRANTING THE WRIT

Point I

The Decision of the Second Circuit, Retroactively Applying Speedy Trial Exclusions to Counts of a Superseding Indictment Which Were Not in Existence at the Time the Exclusions Were Made, Conflicts in Fact and Principle With Other Decisions of That Court, With Decisions of Other Circuits, and With Decisions of Various State Courts.

Point II

The Decision of the Second Circuit Presents an Issue of Great Importance of the Administration of the Federal Criminal Law That Is Likely to Re-Occur and That Has Not Been Addressed by This Court.

Petitioner predicted that the issue presented by this case "will definitely re-occur" (Pet. for Writ of Cert. at 10), and petitioner's prediction has already come true.

In *United States v. Karsseboom,* 871 F. 2d 877 (9th Cir. 1989) the district court had distinguished this case and on appeal the government had argued that this case did not apply; the Ninth Circuit rejected both of these positions, discussed this case in great detail, and then reversed the lower court and ordered dismissal of a superseding indictment. Accordingly, although the Ninth Circuit said it was "join[ing] the Second Circuit," it must be noted that the district court and the government were confused by the meaning and application of this case,

and the Ninth Circuit used this case to *dismiss* a superseding indictment on speedy trial grounds.

In addition, the Second Circuit's decision continues to conflict with speedy trial decisions of the courts of at least one of the states within that very Circuit. See, e.g., *People v. Augustine Rodriguez,* N.Y.L.J. 5/25/89, p. 22, col. 1-2 (1st Dept.) (n.o.r.) ("[P]rosecution of the *newly added charges* in the superseding indictment was barred by the speedy trial provisions of CPL Sec. 30.30. Although there is a continuity between the original and the superseding indictment as to the original charges, *such continuity does not extend to the additional charges* and the defense motion to dismiss the superseding indictment on speedy trial grounds should have been granted *as to those counts.* (See, *People v. Cruz,* 111 AD 2d 725, 726)"* (emphasis added).

Both because the issues presented by this case are likely to re-occur and require clarification, and because there is a conflict between the federal court and the state courts within it, certiorari should be granted.

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* *Cruz* was cited in both the prior and present petitions as an example of a case in conflict with the decision in the instant case.

Point III

The Second Circuit's Decision on the Elements of a Continuing Criminal Enterprise Charge is in Conflict With Decisions of This Court and Other Circuits; In Addition, The Decision of the Second Circuit Presents Issues of Great Importance to the Administration of the Federal Criminal Law.

A. The Verdict as to Acting in Concert and Supervision.

It is petitioner's contention that, because the evidence was insufficient to establish that some of the persons petitioner was accused of supervising were, in fact, his supervisees, there is no way of knowing whether the jury unanimously agreed on the five persons thay had to find petitioner supervised. In further support of petitioner's contentions that the trial court's instructions on this matter were error and/or plain error, we call this Court's attention to: *United States v. Duncan*, 850 F. 2d 1104, 1108-15 (6th Cir. 1988) (failure to specifically instruct jury on need to reach unanimity on underlying *factual* basis for verdict requires reversal); *United States v. Beros*, 833 F. 2d 455, 460-3 (3d Cir. 1987) (same): *United States v. Gipson*, 553 F. 2d 453, 456-8 (5th Cir. 1977) (same).

Furthermore, this issue will continue to present itself to this Court. See, e.g., *United States v. Busacca*, 863 F. 2d 433 (6th Cir. 1988), *cert. denied* 45 Cr.L.Rptr. 4003 (1989).

For either or both of these reasons, certiorari should be granted.

Point IV

The Decision of the Court of Appeals Upholding the Instructions to the Jury is in Conflict With Decisions of This Court and Other Courts of Appeals.

A. Refusal to Charge on Equal Inferences.

It was petitioner's contention that the authorities cited as rejecting the instruction requested here - that if two inferences could be drawn from the testimony *of a witness* the jury had to draw the inference that favored petitioner - were inapplicable because, among other things, they had rejected instructions referring to the inferences to be drawn from the evidence *as a whole.* In further support of this contention, see *United States v. Attanasio,* 879 F. 2d 809, 818 (2d Cir. 1989) (instruction that inference favoring innocence must prevail where inferences of guilt and innocence are equally balanced on the evidence as a whole should not be given because may mislead jury to believe government's burden is less than proof beyond reasonable doubt).

B. *Allen* Charge.

To the list of those jurisdictions which have rejected the *Allen* charge should be added the State of Ohio. *State v. Howard,* 45 Cr.L.Rptr. 2093 (1989).

Moreover, the issue of the propriety of such charges will continue to be brought before this Court. See, e.g., *Keenan v. California,* 109 S.Ct. 1656, 1656-7 (1989) (Marshall, J., dissenting from denial of certiorari).

Conclusion

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SHOULD BE GRANTED, AND THE ORDER OF THAT COURT REVERSED.

Respectfully submitted,

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